

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Sep 30, 2022

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

YOLANDA P.,

Plaintiff,

v.

KILOLO KIJAKAZI,
ACTING COMMISSIONER OF
SOCIAL SECURITY,¹

Defendant.

No. 1:20-CV-03245-JAG

ORDER GRANTING
PLAINTIFF'S MOTION
FOR SUMMARY JUDGMENT
AND REMANDING
FOR ADDITIONAL
PROCEEDINGS

BEFORE THE COURT are cross-motions for summary judgment.

ECF No. 15, 16. Attorney D. James Tree represents Yolanda P. (Plaintiff); Special Assistant United States Attorney David J. Burdett represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. ECF No. 6. After reviewing the administrative record and the briefs filed by the parties, the Court **GRANTS** Plaintiff's Motion for Summary Judgment; **DENIES** Defendant's Motion for Summary Judgment; and

¹ Kilolo Kijakazi became the Acting Commissioner of Social Security on July 9, 2021. Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, Kilolo Kijakazi is substituted for Andrew M. Saul as the defendant in this suit. No further action need be taken to continue this suit. *See* 42 U.S.C. § 405(g).

1 **REMANDS** the matter to the Commissioner for additional proceedings pursuant to
2 42 U.S.C. § 405(g).

3 **I. JURISDICTION**

4 Plaintiff filed applications for Disability Insurance Benefits and
5 Supplemental Security Income on July 6, 2018, alleging disability since September
6 15, 2017. Tr. 15, 216-21, 222-28. The applications were denied initially and upon
7 reconsideration. Tr. 148-51, 155-57, 158-60. Administrative Law Judge (ALJ)
8 Chris Stuber held a hearing on July 16, 2020, Tr. 35-67, and issued an unfavorable
9 decision on August 4, 2020. Tr. 12-34. Plaintiff requested review by the Appeals
10 Council, and on October 30, 2020 the Appeals Council denied the request for
11 review. Tr. 1-6. The ALJ's August 2020 decision became the final decision of the
12 Commissioner, which is appealable to the district court pursuant to 42 U.S.C.
13 § 405(g). Plaintiff filed this action for judicial review on December 23, 2020. ECF
14 No. 1.

15 **II. STATEMENT OF FACTS**

16 The facts of the case are set forth in detail in the transcript of proceedings
17 and are only briefly summarized here. Plaintiff was born in 1978 and was 39 years
18 old on the alleged onset date. Tr. 28. Plaintiff has an 11th grade education and
19 attended special education classes. Tr. 251. She has past work as a housekeeper.
20 Tr. 27, 251. She has numerous impairments including degenerative disc disease of
21 the cervical and lumbar spine, a congenital knee deformity (bilateral genu valgum),
22 osteoarthritis, chondromalacia of the right patella, patellofemoral dysfunction of
23 the left knee, right wrist pain, mental health diagnoses and an intellectual
24 disability; her physical impairments are compounded by morbid obesity. *See e.g.*,
25 Tr. 120-21, 365, 1218, 1231-33, 1381, 1393. She was involved in a motor vehicle
26 collision in July 2015 and reports ongoing back and neck pain and developing and
27 persisting knee pain and weakness, particularly in her right knee, after that date.
28 *See e.g.*, Tr. 359, 362-63, 382-85, 391, 582, 1398.

III. STANDARD OF REVIEW

The ALJ is responsible for determining credibility, resolving conflicts in medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). The ALJ's determinations of law are reviewed *de novo*, with deference to a reasonable interpretation of the applicable statutes. *McNatt v. Apfel*, 201 F.3d 1084, 1087 (9th Cir. 2000). The decision of the ALJ may be reversed only if it is not supported by substantial evidence or if it is based on legal error. *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is defined as being more than a mere scintilla, but less than a preponderance. *Id.* at 1098. Put another way, substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401 (1971). If the evidence is susceptible to more than one rational interpretation, the Court may not substitute its judgment for that of the ALJ. *Tackett*, 180 F.3d at 1097; *Morgan v. Comm'r of Soc. Sec. Admin.*, 169 F.3d 595, 599 (9th Cir. 1999). If substantial evidence supports the administrative findings, or if conflicting evidence supports a finding of either disability or non-disability, the ALJ's determination is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir. 1987). Nevertheless, a decision supported by substantial evidence will be set aside if the proper legal standards were not applied in weighing the evidence and making the decision. *Browner v. Sec'y of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988).

IV. SEQUENTIAL EVALUATION PROCESS

The Commissioner has established a five-step sequential evaluation process for determining whether a person is disabled. 20 C.F.R. §§ 404.1520(a), 416.920(a); *Bowen v. Yuckert*, 482 U.S. 137, 140-142 (1987). In steps one through four, the claimant bears the burden of establishing a prima facie case of disability. *Tackett*, 180 F.3d at 1098-1099. This burden is met once a claimant establishes that a physical or mental impairment prevents the claimant from engaging in past

1 relevant work. 20 C.F.R. §§ 404.1520(a)(4), 416.920(a)(4). If a claimant cannot
2 perform past relevant work, the ALJ proceeds to step five, and the burden shifts to
3 the Commissioner to show (1) the claimant can make an adjustment to other work
4 and (2) the claimant can perform other work that exists in significant numbers in
5 the national economy. *Beltran v. Astrue*, 700 F.3d 386, 389 (9th Cir. 2012). If a
6 claimant cannot make an adjustment to other work in the national economy, the
7 claimant will be found disabled. 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v).

8 **V. ADMINISTRATIVE FINDINGS**

9 On August 4, 2020, the ALJ issued a decision finding Plaintiff was not
10 disabled, as defined in the Social Security Act. Tr. 12-34.

11 At **step one**, the ALJ found Plaintiff had not engaged in substantial gainful
12 activity since her alleged onset date. Tr. 17.

13 At **step two**, the ALJ determined Plaintiff had the following severe
14 impairments: degenerative disc disease of the cervical and lumbar spine;
15 degenerative joint disease of the right knee; carpal tunnel syndrome of the right
16 upper extremity; obesity; and borderline intellectual functioning. Tr. 18.

17 At **step three**, the ALJ found Plaintiff did not have an impairment or
18 combination of impairments that met or medically equaled the severity of one of
19 the listed impairments. Tr. 18-20.

20 The ALJ assessed Plaintiff's Residual Functional Capacity (RFC) and found
21 she could perform sedentary work, but with the following limitations:

22 [Plaintiff] is able to lift and/or carry 10 pounds occasionally and less
23 than 10 pounds frequently. She can stand and/or walk about 2 hours in
24 an 8 hour workday and can sit about 6 hours. She can occasionally
25 climb ramps and stairs, but never climb ladders, ropes, or scaffolds. She
26 can occasionally balance and stoop, but never kneel, crouch, or crawl.
27 [Plaintiff] can handle, finger, and feel with the right upper extremity on
28 a frequent basis. She can have only occasional exposure to extreme cold
and extreme heat and should avoid all exposure to hazardous machinery
and unprotected heights. She is able to understand, remember, and carry

1 out simple, routine instructions with only occasional changes in the
2 work setting. She can have brief and superficial interactions with the
3 public and coworkers.

4 Tr. 20.

5 At **step four**, the ALJ found Plaintiff was unable to perform any past
6 relevant work. Tr. 27-28.

7 At **step five**, the ALJ found that, based on the testimony of the vocational
8 expert and considering Plaintiff's age, education, work experience and residual
9 functional capacity, there were jobs that existed in significant numbers in the
10 national economy that Plaintiff could perform, including the representative
11 occupations of document preparer, addresser, and final assembler. Tr. 28.

12 The ALJ thus concluded Plaintiff was not under a disability within the
13 meaning of the Social Security Act at any time from the alleged onset date through
14 the date of the decision. Tr. 29.

15 VI. ISSUES

16 Plaintiff seeks judicial review of the Commissioner's final decision denying
17 her disability insurance benefits under Title II and Title XVI of the Social Security
18 Act. The question presented is whether substantial evidence supports the ALJ's
19 decision denying benefits and, if so, whether that decision is based on proper legal
20 standards.

21 Plaintiff raises the following issues for review: (1) whether the ALJ properly
22 evaluated Plaintiff's subjective complaints; (2) whether the ALJ conducted a
23 proper step-three analysis; (3) whether the ALJ conducted a proper step five
24 analysis; and (4) whether the ALJ properly evaluated the medical opinion
25 evidence. ECF No. 15 at 2.

VII. DISCUSSION

A. Step Three Findings.

Plaintiff contends the ALJ erred by failing to properly consider listing 1.02 and 12.11. ECF No. 15 at 12-16. Specifically, Plaintiff argues the ALJ's finding in regard to Listing 1.02 was conclusory and lacking citation to the record. ECF No. 15 at 13.

At step three of the sequential evaluation process, the ALJ considers whether one or more of the claimant's impairments meets or equals an impairment listed in Appendix 1 to Subpart P of the regulations. 20 C.F.R. § 404.1520(a)(4)(iii). Each Listing sets forth the "symptoms, signs, and laboratory findings" which must be established for a claimant's impairment to meet the Listing. *Tackett*, 180 F.3d at 1099. If a claimant meets or equals a Listing, the claimant is considered disabled without further inquiry. 20 C.F.R. § 404.1520(d). "An ALJ must evaluate the relevant evidence before concluding that a claimant's impairments do not meet or equal a listed impairment. A boilerplate finding is insufficient to support a conclusion that a claimant's impairment" does not meet or equal a listed impairment. *Lewis v. Apfel*, 236 F.3d 503, 512 (9th Cir. 2001). However, the ALJ is not required to state why a claimant fails to satisfy every criteria of the listing if they adequately summarize and evaluate the evidence. *See Gonzalez v. Sullivan*, 914 F.2d 1197, 1200-01 (9th Cir.1990); *Lewis*, 236 F.3d at 512.

Here, the ALJ found Plaintiff's impairments did not meet or equal any listed impairment. Tr. 18. For listing 1.02, the ALJ concluded "[t]he [Plaintiff's] knee impairment does not meet listing 1.02 (dysfunction of a joint). The objective medical evidence does not show involvement of one major peripheral weight bearing joint resulting in the inability to ambulate effectively." Tr. 19. The ALJ devoted two sentences to the listing, consisting of a summary of the listing with no citation to the record or further explanation. This conclusory analysis is inadequate. *Lewis v. Apfel*, 236 F.3d 503, 512 (9th Cir. 2001) (concluding a boilerplate finding

1 that a claimant's impairment fails to meet or equal a Listing "is insufficient to
 2 support a conclusion that a claimant's impairment does not do so."). Elsewhere in
 3 the decision, the ALJ briefly discusses Plaintiff's knees but fails to discuss relevant
 4 medical evidence. Tr. 22.

5 Listing 1.02A,² concerns:

6
 7 *Major dysfunction of a joint(s) (due to any cause):* characterized by a
 8 gross anatomical deformity (e.g., subluxation, contracture, bony or
 9 fibrous ankylosis, instability) and chronic joint pain and stiffness with
 10 signs of limitation of motion or other abnormal motion of the affected
 11 joint(s), and findings on appropriate medically acceptable imaging of
 joint space narrowing, bony destruction, or ankylosis of the affected
 joint(s). With:

12 A. Involvement of one major peripheral weight-bearing joint (i.e.,
 13 hip, knee or ankle), resulting in inability to ambulate effectively,
 14 as defined in 1.00B2b.

15 20 C.F.R. Pt. 404, Subpt. P, App. 1, 1.02A.

16 Inability to ambulate is defined in the Musculoskeletal Listings as:

17
 18 (1) *Definition.* Inability to ambulate effectively means an extreme
 19 limitation of the ability to walk; i.e., an impairment(s) that interferes
 20 very seriously with the individual's ability to independently initiate,
 21 sustain, or complete activities. Ineffective ambulation is defined
 22 generally as having insufficient lower extremity functioning (see 1.00J)
 to permit independent ambulation without the use of a hand-held
 assistive device(s) that limits the functioning of both upper extremities.

23 . . .

24
 25
 26 ² As of April 2, 2021, Listing 1.02 was removed and replaced with Listing 1.18.
 27 See 20 C.F.R. Pt. 404, Subpt. P, App. 1 (April 2, 2021). The Court applies the
 28 Listing that was in effect at the time of the ALJ's decision.

1 (2) *To ambulate effectively*, individuals must be capable of sustaining a
2 reasonable walking pace over a sufficient distance to be able to carry
3 out activities of daily living. They must have the ability to travel
4 without companion assistance to and from a place of employment or
5 school. Therefore, examples of ineffective ambulation include, but are
6 not limited to, the inability to walk without the use of a walker, two
7 crutches or two canes, the inability to walk a block at a reasonable pace
8 on rough or uneven surfaces, the inability to use standard public
9 transportation, the inability to carry out routine ambulatory activities,
such as shopping and banking, and the inability to climb a few steps at
a reasonable pace with the use of a single handrail. The ability to walk
independently about one's home without the use of assistive devices
does not, in and of itself, constitute effective ambulation.

10 20 C.F.R. Pt. 404, Subpt. P, App. 1, § 1.00B2b.

11 The ALJ briefly discusses Plaintiff's knees in the decision, summarizing the
12 listing above and later in the decision noting only that "she has fairly bad knees,
13 but not to the extent that the minimal demands of sedentary work would be ruled
14 out." Tr. 22. The ALJ cites to imaging from 2016-2018 that shows mild
15 osteoarthritis and subluxation of the patella and concludes analysis of her knee
16 impairments by noting mild findings in her ankle and foot from x-rays for a
17 sprained ankle in 2020. Tr. 22.

18 An ALJ must consider all of the relevant evidence in the record and may not
19 point to only those portions of the records that bolster his findings. *See, e.g.,*
20 *Holohan v. Massanari*, 246 F.3d 1195, 1207-08 (9th Cir. 2001) (holding that an
21 ALJ cannot selectively rely on some entries in plaintiff's records while ignoring
22 others). Here, records show chronic knee pain, with objective evidence of
23 congenital knee issues (bilateral genu valgum, noted severe in 2019), progressing
24 osteoarthritis and patellofemoral dysfunction, along with morbid obesity, which (as
25 indicated in the musculoskeletal listings) exacerbates Plaintiff's musculoskeletal
26 impairment(s) and, in this case, has prevented corrective surgery on her knees
27 throughout the period at issue. *See e.g.,* Tr. 1232-33, 1383; 20 C.F.R. Pt. 404,
28 Subpt. P, App. 1, § 1.00Q.

1 In 2019 Plaintiff's orthopedic surgeon indicated she had a "major deformity
2 present in both knees" and "she is developing osteoarthritis lateral compartment
3 [and] has patellofemoral dysfunction." Tr. 1232-33. He explained "[t]he treatment
4 here is corrective osteotomy, turning her legs to a neutral position which have
5 never been neutral," but explained she is unable to have corrective surgery until
6 she loses about 100 pounds. 1232-33. He determined "she will advance to an
7 arthritic condition at an early age and become disabled more so than she is at this
8 time without treatment." Tr. 1233.

9 Additionally, the additional and cumulative effects of obesity must be
10 considered under the musculoskeletal listing because, as noted in the listing,
11 "disturbance of this system can be a major cause of disability in individuals with
12 obesity, the combined effects of obesity with musculoskeletal impairments can be
13 greater than the effects of each of the impairments considered separately." *See* 20
14 C.F.R. Pt. 404, Subpt. P, App. 1, § 1.00Q. Here, the ALJ concludes only that "the
15 evidence does not establish that the [Plaintiff's] obesity impairment, alone or in
16 combination with her other impairments, medically equals any of the listings"; the
17 ALJ notes elsewhere in the decision that "[Plaintiff's] body mass index (BMI) puts
18 her in the obese range thought the period of adjudication" but this impairment has
19 been considered in limiting her to "sedentary work with postural and
20 environmental restrictions." Tr. 19, 24. Plaintiff is morbidly obese, however, with
21 body mass index (BMI) noted 42.98 and up to 54.87 during the period at issue. *See*
22 *e.g.*, Tr. 362, 365, 370, 376, 580, 603, 806, 1046, 1050, 1052, 1231. She cannot
23 have corrective knee surgery until she loses at least 100 pounds. The ALJ provides
24 little to no analysis of her obesity and how this may compound her impairments or
25 affect her weight bearing joints; he notes that she is generally in the "obese range,"
26 when in fact she has a diagnosis of morbid obesity with BMI frequently higher
27 than 45 throughout the period at issue. *Id.* The ALJ does not discuss her high BMI,
28 or how morbid obesity may compound or otherwise affect her musculoskeletal

1 impairment(s), especially her knees, including ability to effectively ambulate as
2 required by the musculoskeletal listing in effect at the time of the decision.

3 Plaintiff has reported she is unable to work due to knee pain, yet the ALJ
4 limited discussion of her knees to a brief paragraph in the decision. Tr. 22. Records
5 show reports of chronic knee pain, which is exacerbated by a congenital knee
6 defect and Plaintiff's morbid obesity, with evidence of knee instability, difficulty
7 ambulating, and increased falls during the period at issue. Tr. 359, 362, 555-56,
8 559, 582-583, 585, 955, 1204-05, 1398. The ALJ failed to discuss evidence of
9 multiple knee impairments, including primary osteoarthritis in the right knee,
10 chondromalacia of right patella, congenital genu valgum of both knees, and patella
11 femoral dysfunction of the left knee; he does not discuss relevant findings in both
12 knees, including MRIs of her right knee in 2016 and 2018, which showed tear of
13 the lateral meniscus; patellar chondromalacia, including absent cartilage of the
14 lateral facet of the patella on the right (in 2018); moderate joint effusion; and
15 osteoarthritis of the right knee, advanced for her age. Tr. 846, 992, 1232-33.
16 Plaintiff was noted to ambulate with mild to moderate difficulty on multiple
17 occasions, had falls, and was prescribed crutches in the ER while waiting for an
18 appointment with her primary care provider for a knee issue the ER doctor
19 described as "chronic" in 2018. *See, e.g.*, Tr. 359, 376, 490, 584-89, 621, 955, 966-
20 67, 1215. In 2019 her physical therapist recommended a cane to "decrease stress to
21 knees/spine and to help w/fall prevention." Tr. 1410-12.

22 The ALJ failed to properly assess her knee impairments under listing 1.02A
23 or elsewhere in the decision and the ALJ's conclusory findings are not supported
24 by substantial evidence. On remand the ALJ shall reconsider the step three findings
25 with assistance of medical expert testimony.

26 Plaintiff contends the ALJ also erred in failing to properly consider listing
27 12.11. ECF No. 15 at 13-16. On remand, the ALJ shall reconsider all medical
28 evidence and make additional step three findings as warranted.

1 **B. Subjective Complaints.**

2 Plaintiff alleges the ALJ improperly disregarded her subjective symptom
3 reports. ECF No. 15 at 4-12.

4 It is the province of the ALJ to make determinations regarding a claimant's
5 subjective statements. *Andrews*, 53 F.3d at 1039. However, the ALJ's findings
6 must be supported by specific, cogent reasons. *Rashad v. Sullivan*, 903 F.2d 1229,
7 1231 (9th Cir. 1990). Once the claimant produces medical evidence of an
8 underlying medical impairment, the ALJ may not discredit testimony as to the
9 severity of an impairment merely because it is unsupported by medical evidence.
10 *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir. 1998). Absent affirmative evidence
11 of malingering, the ALJ's reasons for rejecting the claimant's testimony must be
12 "specific, clear and convincing." *Smolen v. Chater*, 80 F.3d 1273, 1281 (9th Cir.
13 1996); *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1996). "General findings are
14 insufficient: rather the ALJ must identify what testimony is not credible and what
15 evidence undermines the claimant's complaints." *Lester*, 81 F.3d at 834; *Dodrill v.*
16 *Shalala*, 12 F.3d 915, 918 (9th Cir. 1993).

17 The ALJ concluded Plaintiff's medically determinable impairments could
18 reasonably be expected to cause the alleged symptoms; however, Plaintiff's
19 statements concerning the intensity, persistence and limiting effects of those
20 symptoms were not entirely consistent with the medical evidence and other
21 evidence in the record. Tr. 21. Plaintiff argues the ALJ failed to provide specific,
22 clear and convincing reason to not fully credit Plaintiff's allegations. ECF No. 15
23 at 4-12. Defendant argues the ALJ provided valid reasons to discount Plaintiff's
24 allegations. ECF No. 16 at 3-12. The Court finds the ALJ failed to offer clear and
25 convincing reasons for disregarding Plaintiff's subjective complaints.

26 **1. Objective Findings/Longitudinal Evidence.**

27 The ALJ determined Plaintiff's allegations were not supported by "workup
28 findings," citing mild objective findings and generally benign physical

1 examinations. Tr 22-23. An ALJ may cite inconsistencies between a claimant's
2 testimony and the objective medical evidence in discounting the claimant's
3 testimony. *Bray v. Comm'r of Soc. Sec. Admin.*, 554 F.3d 1219, 1227 (9th Cir.
4 2009). However, an ALJ must consider all of the relevant evidence in the record
5 and may not point to only those portions of the records that bolster his findings.
6 *See, e.g., Holohan v. Massanari*, 246 F.3d 1195, 1207-08 (9th Cir. 2001) (holding
7 that an ALJ cannot selectively rely on some entries in plaintiff's records while
8 ignoring others).

9 Here, as discussed *supra*, Plaintiff has consistently reported she is unable to
10 work due to pain, specifically knee pain, yet the ALJ failed to discuss most of the
11 objective evidence relevant to Plaintiff's knee impairments, including evidence of
12 a congenital deformity of both knees. In a limited discussion of her knees, the ALJ
13 focuses on mild x-ray findings including x-rays of her foot and ankle from 2020,
14 without discussing relevant findings upon physical exam throughout the record or
15 from MRIs of her knees in 2016 and 2018. Tr. 846, 992, 1232-33, 1402.

16 Further, the ALJ selectively cites from exams unrelated to her alleged
17 impairments to discredit her symptom reports, noting normal musculoskeletal
18 findings at ER visits for an upper respiratory infection and a ruptured ovarian cyst,
19 for example, while not discussing numerous primary care records, specialist
20 including orthopedic and pain clinic records, or multiple visits to the ER over a
21 period of years for knee, back, and neck pain. *See e.g.*, Tr. 352, 363, 369, 376, 586-
22 87, 955, 1233, 1388, 1405-06, 1435. Notably, Dr. Baylor, the state agency
23 consultant the ALJ found persuasive, determined that the "objective findings
24 appear mostly [consistent with] reported s[ymptoms]..."; she noted Plaintiff is
25 "morbidly obese and has documentation of cervical and lumbar spondylosis plus
26 [degenerative disc disease] at C3-4 and L5-S1; suspected of having right carpal
27 tunnel impingement ... and has severe deformities of the knees." Tr. 119, 122.
28

1 The ALJ erred in his interpretation of the medical evidence and erred in
2 citing portions of the record showing milder findings while the longitudinal record
3 showed more mixed results, leading to a characterization of the medical evidence
4 as a whole that is not supported by substantial evidence.

5 **2. Accidents.**

6 The ALJ found Plaintiff “attributes much of her pain to a series of accidents
7 that do not substantiate her allegations.” Tr. 22. Review of the longitudinal record
8 confirms Plaintiff’s involvement in a motor vehicle accident in July 2015 and
9 shows consistent reports of developing or increasing back and knee pain after that
10 date. Tr. 382-52, 391-402. For example, she went to the ER repeatedly during the
11 summer of 2016 reporting persistent back pain since an accident a year earlier;
12 records show consistent report of increasing knee pain or issues after 2015, as well.
13 *See e.g.*, Tr. 435, 444, 456, 469, 488. In May 2016, for example, she reported a car
14 accident “last summer” with pain in her back and “now knee pain started about 6
15 months ago, has become unbearable.” Tr. 640. Later in the record, whether
16 Plaintiff misspoke or due to a scrivener’s error by her provider(s), the date of the
17 2015 accident is frequently reported as July 2016 in many records; she also reports
18 being struck by a car as a pedestrian on two occasions in 2019. Tr. 1304, 1420.
19 There is no indication anywhere in the longitudinal record that any provider
20 doubted her claims. Furthermore, as Plaintiff points out, the cause of her
21 impairment(s) is irrelevant; her impairments are well supported by the medical
22 evidence. ECF No. 17 at 2-3. Based on the longitudinal record, the Court finds no
23 inconsistency in Plaintiff’s report of injury and increasing or developing pain after
24 an accident.

25 The ALJ’s characterization of the evidence is not supported by substantial
26 evidence.

1 **3. Activities.**

2 A claimant's daily activities may support an adverse credibility finding if the
3 claimant's activities contradict her other testimony. *Orn v. Astrue*, 495 F.3d 625,
4 639 (9th Cir. 2007). Here, the ALJ pointed to Plaintiff's general ability to drive,
5 ability "to act as a caregiver for children," and her "statements regarding work
6 activity" as inconsistent with her allegations. Tr. 25-26. None of these activities are
7 inconsistent with Plaintiff's allegations of chronic pain and other symptoms
8 preventing her from working a full-time job during the period at issue. The Ninth
9 Circuit has repeatedly found that the ability to perform these kinds of activities is
10 not inconsistent with the inability to work:

11 We have repeatedly warned that ALJs must be especially cautious in
12 concluding that daily activities are inconsistent with testimony about
13 pain, because impairments that would unquestionably preclude work
14 and all the pressures of a workplace environment will often be
15 consistent with doing more than merely resting in bed all day.

16 *Garrison v. Colvin*, 759 F.3d 995, 1016 (9th Cir. 2014).

17 Further, while the ALJ found her "ability to act as the caretaker for children
18 ... incompatible with her allegations," Plaintiff's children are adults (one was 17
19 during the period at issue), and while she may spend time with her grandchild,
20 there is no evidence she regularly acts as a caregiver. Tr. 26, 50, 1049. Further, if
21 such care activities are to serve as a basis for the ALJ to discredit the Plaintiff's
22 symptom claims, the record must identify the nature, scope, and duration of the
23 care involved and this care must be "hands on" rather than a "one-off" care
24 activity. *Trevizo v. Berryhill*, 871 F.3d 664, 675-76 (9th Cir. 2017). While the ALJ
25 discredits her allegation based on her reports of work activity at a fair in 2018, she
26 testified this was a job checking IDs at a fair for ten days in 2018; and records
27 reveal she required a note permitting her to sit as needed after she reported a fall.
28 Tr. 301, 1135, 1205.

1 The ALJ's characterization of the evidence in relation to Plaintiff's activities
2 is also not supported by substantial evidence.

3 **4. Other Reasons.**

4 The ALJ made other findings regarding the consistency of Plaintiff's
5 symptom testimony with the medical evidence. However, given the errors already
6 discussed, the Court declines to consider additional reasons here. Because this
7 claim is being remanded for further reconsideration of the step three findings, any
8 reevaluation must necessarily entail reassessment of Plaintiff's subjective claims in
9 light of the record as a whole. Upon remand, the ALJ shall carefully reevaluate
10 Plaintiff's statements with the assistance of medical expert testimony and any other
11 evidence or testimony necessary.

12 **C. Step Five Findings.**

13 Plaintiff contends the ALJ erred by failing to consider evidence of Plaintiff's
14 functional literacy at step five. ECF No. 15 at 16-17. As the case is being
15 remanded for the ALJ to properly address step three findings and Plaintiff's
16 subjective complaints, the ALJ shall reperform the sequential evaluation process,
17 including step five.

18 **D. Opinion Evidence.**

19 Plaintiff argues the ALJ improperly rejected the opinion of Emma Billings,
20 PhD. ECF No. 15 at 17-21. Having determined a remand is necessary to readdress
21 the step three findings and Plaintiff's subjective complaints, the Court declines to
22 reach the alternative ground for remand. *See Hiler v. Astrue*, 687 F.3d 1208, 1212
23 (9th Cir. 2012) ("Because we remand the case to the ALJ for the reasons stated, we
24 decline to reach [plaintiff's] alternative ground for remand.").

25 On remand the ALJ is instructed to reconsider the full medical record and
26 revise or make additional findings in regards to the medical opinion evidence as
27 warranted in completing the five-step process.
28

VIII. CONCLUSION

The ALJ's decision is not supported by substantial evidence and not free of harmful legal error. On remand, the ALJ is instructed to call a medical expert and to reevaluate the Listings, Plaintiff's subjective complaints, and all the medical evidence of record, making findings on each of the five steps of the sequential evaluation process. The ALJ shall take into consideration any other evidence or testimony relevant to Plaintiff's disability claim.

Accordingly, **IT IS ORDERED:**

1. Plaintiff's Motion for Summary Judgment, **ECF No. 15**, is **GRANTED**.

2. Defendant's Motion for Summary Judgment, **ECF No. 16**, is **DENIED**.

3. The matter is **REMANDED** to the Commissioner for additional proceedings consistent with this Order.

4. An application for attorney fees may be filed by separate motion.

The District Court Executive is directed to file this Order and provide a copy to counsel for Plaintiff and Defendant. Judgment shall be entered for Plaintiff and the file shall be **CLOSED**.

IT IS SO ORDERED.

DATED September 30, 2022.




JAMES A. GOEKE
UNITED STATES MAGISTRATE JUDGE